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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 689

JAMES BUDZILENI,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Your petitioner, James Budzileni, defendant-appellant below, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on October 24, 1956. (See Appendix C).

Opinion Below.

The opinion of the Court of Appeals for the Seventh Circuit, dated October 24, 1956, is reported at ..... F. 2d ..... It is set out in the transcript of proceedings (R. .....) and is reproduced in full in Appendix D of this petition. The District Court did not render an opinion.

Jurisdiction.

The jurisdiction of this Court is invoked under Title 28, U.S. Code, Section 1254(1).

Questions Presented.

1. Are the administrative functions of the Immigration & Naturalization Service, including the power to subpoena, exhausted with the alien's naturalization under the provisions of the Immigration and Nationality Act of 1952?

a) May the Service exercise continuing jurisdiction to investigate naturalized citizens?

2. Whether a judicial proceeding, brought under Section 235(a) of the Immigration and Nationality Act of 1952, for the enforcement of an administrative subpoena, is a *de novo* civil action requiring compliance with the Federal Rules of Civil Procedure?

a) May a judicial order to compel the witness to testify before the Service be entered *ex parte?*

b) Does the District Court, in such proceeding, obtain jurisdiction over the person of the defendant where there was no service of process?

Statutes Involved.

Immigration and Nationality Act of 1952, Section 235(a) (8 U.S.C.A. Sect. 1225(a) (See Appendix A of this petition)

Immigration and Nationality Act of 1952, Section 340(a) (8 U.S.C.A. Sect. 1451(a)).

Federal Rules of Civil Procedure, Rule 81(a)(3). (See Appendix B of this petition)

Federal Rules of Civil Procedure, Rule 4(d)(1). (See Appendix B of this petition)

Statement.

This proceeding to compel testimony in an administrative investigation purports to be brought under Section 235(a) of the Immigration and Nationality Act of 1952 (8 U.S.C.A. Sect. 1225(a)).

This provision is found in Chapter 4 of Title II of the Act, which is entitled "Provisions Relating to Entry and Exclusion". The text of Section 235(a) is reprinted in Appendix A at the end of this petition.

The complaint, together with the exhibits attached thereto, alleges (R. 5, 6, 7, 8, 9, 10, 11, 1 that in June, 1954, the defendant, James Budzileni, received from the Chicago Office of the United States Immigration and Naturalization Service an administrative subpoena which stated that he was required to appear and give testimony pursuant to Section 235(a) of the Immigration and Nationality Act. At the top of the subpoena was the following caption: In re Gunnar Carl Carlquist". (R. 6, 7). The subpoena, signed by Walter A. Sahli, District Director, Chicago District, did not designate any person before whom the testimony was to be taken. (R. 6, 7). The complaint further alleges that defendant has refused and neglected to obey the subpoena and give testimony (R. 6, 7, 8, 9, 10, 11, 12).

This action was filed on September 20, 1954, in the United States District Court for the Northern District of Illinois to compel defendant's obedience to the administrative subpoena. The complaint requests the Court to order the defendant to appear and give testimony before the Acting District Director, Immigration and Naturalization Service, in Chicago, Illinois. (R. 6)

No service of summons and complaint upon defendant was attempted. (R. 21). Instead, on the following day the Government, without notice to defendant, moved the Court for entry of an *ex parte* order requiring defendant to appear and testify. (R. 13).

An order was then entered *ex parte* by the District Court requiring defendant to appear before Stanley F. Perryman, at Room 928, New Post Office Building, 533 West Van Buren Street, Chicago 7, Illinois on September 28, 1954 at a designated hour, and give testimony. (R. 14).

A copy of this *ex parte* order was thereupon served upon defendant by the United States Marshal. (R. 15)

Defendant's first notice of the existence of this proceeding came with the service upon him of said *ex parte* order.

On October 7, 1954, defendant filed a motion to stay the order of September 21, 1954, or in the alternative to dismiss the complaint and vacate the Order. (R. 15, 16, 17). Thereafter, on February 17, 1956, defendant was permitted a substitution of attorneys, and on that day hearing on his motion, which had been continued from time to time by agreement, was set for argument on February 24, 1956.

On February 24, 1956, the District Court entered an order overruling said motion and further ordered defendant to appear before Stanley F. Perryman, or some other duly authorized Immigration Officer, on March 9, 1956, to give testimony. (R. 17, 18).

Notice of Appeal was thereupon filed by defendant on March 5, 1956. (R. 19). The appeal was made a super-

sedeas by order of the District Court and bond was fixed at Two Hundred Fifty Dollars. An order was thereupon entered approving defendant's combined supersedeas and cost bond. (R. 21)

On October 24, 1956, the Court of Appeals affirmed the judgment of the District Court. (See Appendix C.) The affirmance was accompanied by an opinion written by Circuit Judge Finnegan. *United States* v. *Budzileni*, 7 Cir., ... F. 2d ..... This opinion is reproduced in full in Appendix D of this petition.

Reasons for Granting Writ.

1. Minker decision should be reviewed in the light of the Bindczyck decision.

A. The Service's Administrative Functions Cease With Alien's Naturalization.

Some years ago, Mr. Justice Frankfurter, speaking for the majority of the Court in *Bindczyck* v. *Finucane*, 342 U.S. 76, exhaustively surveyed the various immigration and naturalization laws enacted by Congress throughout our nation's history. That decision, both with respect to its historical findings and underlying philosophy, discloses a fixed Congressional scheme of limitation imposed on the government in effectuating revocation of fraudulent naturalization certificates, which, until recently, established a clear and precise policy for the administration and enforcement of our immigration and naturalization laws.

However, recently, and since the codification of these laws in the Immigration and Nationality Act of 1952, this Court has decided two cases, one which seemingly contradicts the former policy and the other which approves that policy.

With respect to the first of these two cases, this Court in *United States* v. *Minker*, 350 U.S. 179, while striking down the Service's attempted use of its subpoena power when directed against the individual under investigation, nevertheless, although without deciding, gave tacit approval to the Service's investigation of the naturalized citizen. Whereas, in *United States* v. *Zucca*, 24 L. W. 4232, No. 213, April 30, 1956, the Court reiterated its approval of the *Bindczyck* philosophy, which states that all administrative oversight ends with the alien's naturalization.

It is respectfully submitted that the conflict between these two views, so unsettles the policy of this Court regarding the statutory limitation imposed on the government in the post-naturalization period, that it is imperative that the Court review the issues in this cause, in order that a clear policy may be laid down for the administration and enforcement of the new Act.

The differentiation, which *Bindczyck* pointed out, between the pre and the post-naturalization periods, so integral to the statutory scheme, was not the result of legislative oversight, but was carefully and deliberately drawn by Congress to preserve the fundamental constitutional distinction between the alien and the citizen. This limitation, it was further pointed out, does not burden or prevent the government from effectuating revocation of illegally or fraudulently obtained naturalization certificates, but merely requires that the government effectuate this through the denaturalization provisions of the Act, which were described as the "self-contained, exclusive procedure" set up by Congress to safeguard the naturalized citizen against "haphazard denaturalization". The reason advanced in *Bindczyck* for insulating the naturalized citizen against attacks upon his citizenship, made by the government in the Courts, except by the prescribed denaturalization procedure (naturalization " • • • was to be proof against attacks for fraud or illegal procurement"), is equally, if not even more applicable, to attacks made on his citizenship by the administrative agency—which has already exercised jurisdiction over him from the time of his arrival at these shores to the time he became a citizen.

To allow the Service now, because of its power to subpoena persons, to exercise a continuing jurisdiction over the naturalized citizen, "where the purpose of the investi-

gation is to determine whether good cause exists for the institution of denaturalization proceedings under Section 340(a) of the Act," is to destroy the carefully devised policy of limitation imposed by Congress on the government for the protection of its citizens.

2. The problem in the construction of Sec. 235 (a) is not—who is the witness? But rather,—what is the purpose or object of the investigation? (About whom is the investigation conducted?)

The new language added by Congress to Section 235(a), with respect to the subpoena power, does not and was not intended to change the Congressional limitation imposed on the government after naturalization. This is evident if attention is focused on the entire section and not merely, as the Court did in the *Minker* case, on the part having to do with the power to subpoena.

Section 235(a), taken as a whole, comprehends two powers—the power to take evidence or investigate and the power to subpoena, which latter power is in aid of the investigatory power. With respect to the power to investigate, Section 235(a) provides:

> "* * * The Attorney General and any immigration officer * * * shall have the power to administer oaths and to take and consider evidence *of and from any person touching the privilege of any alien or person he believes or suspects to be an alien* to enter, reenter, pass through or reside in the United States, *or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service* * * * " (Emphasis supplied)

The most obvious interpretation of this sentence is that when evidence is taken by these officials from the *testimony of persons*, that testimony must relate to an *alien* or a person believed to be an *alien*, because the limiting phrase "touching the privilege of an alien * * * " refers

to the words "of and from any person" which precede it. Indeed, this would be the only possible interpretation, in the absence of the *additional clause* "or concerning any matter which is material and relevant to the enforcement of this Act * * * " If then, the phrase, "touching the privilege of any alien * * * " requires, at least in the absence of the said *additional clause*, that the evidence taken from the *testimony of persons* be so limited, surely it cannot logically follow, that when the evidence is so taken (from the testimony of persons) that it may also *not* be so limited—without doing violence to the limiting phrase!

Hence, as the problem in the construction of this sentence *only* arises because of the *additional clause*, it is evident that this sentence must now be read in such a way as to avoid the contradiction and yet be consistent with the first interpretation. This is not possible if the sentence is read that, these officials may " * * * take and consider evidence *of and from any person* * * * concerning any matter which is material and relevant to the enforcement of this Act * * * " without reading the limiting phrase, which refers to the testimony taken *of and from any person*, out of the sentence.

But, can this sentence now be read (leaving out the words "of and from any person") that these officials may " * * * take and consider evidence * * * concerning any matter which is material and relevant to the enforcement of this Act * * * "? Such construction would produce an even more blatant contradiction, for this would be tantamount to saying that the power to investigate is more broadly drawn when the evidence is *not* taken from the *testimony of persons* (as for example, from books, papers and documents), then when it *is* taken from the testimony of persons. Surely, Congress would not define a power with such a shifting or double standard.

It follows then that the scope of the Attorney General and immigration officer's power to investigate and take evidence is limited to such inquiries as relate to *aliens* or persons believed to be aliens—not to citizens. And the fact that this provision contains the same additional clause as was added to the subpoena provision, does not enlarge or expand the power to investigate aliens to include a power to investigate citizens.

Obviously, the emphasis here is not on who the person is whose testimony is being sought, but rather, about whom is this person being asked to testify. Hence, if the subject of that investigation is anyone other than an alien, the investigation exceeds the scope of authority of the governmental official seeking to conduct the investigation —regardless of whether that official be the Attorney General or an immigration officer. Otherwise put, the investigation is "material and relevant to the enforcement of this Act * * * ", when it relates to an alien, but is immaterial and irrelevant when it relates to anyone other than an alien.

Consequently, inasmuch as the subpoena is merely a compulsory process used in aid of the investigatory power, it therefore necessarily follows that neither the Attorney General nor an official of the Service may *subpoena* any person in connection with an investigation relating to a citizen. By this it is not intended to say that the Attorney General, when he believes or suspects possible violations of the laws, is powerless to make whatever investigations he deems proper. What we do emphasize, however, is that he may not use the *subpoena power*, provided in Section 235(a) of this Act, in connection with his investigations relating to a naturalized citizen. In other words, he may not borrow a subpoena power from this Act and which

is peculiar only to this Act, in furtherance of investigations which he may be conducting under authority of other statutes.

This construction of the power to investigate commends itself to approval not only for the reasons hereinbefore advanced, but because it is the only interpretation which is consistent with the *Bindczyck* philosophy, which holds that *all* administrative oversight, whether by the Attorney General or the Service, ends at the point of the alien's naturalization.

To those critics who complain that Congress could not and did not intend to take into account every conceivable situation and problem that might confront the government in the future in protecting itself against naturalization frauds, your petitioner can offer no better argument than that made by this Court in Bindczyck, where it is said:

> "Neither uncontested practice nor adjudication by lower courts has rendered a verdict which is disregarded by our construction of section 338. Nor as a rule of future conduct is any burden placed on the government in setting aside a naturalization order where it can prove illegality or fraud."

Indeed, as the Court pointed out:

> "Every national interest is thereby protected."

If then, before the passage of the new Act, it was thought that "every national interest" was protected by the statutory framework provided for effectuating revocation of fraudulent naturalization certificates, the argument that the Attorney General must have someone, preferably the Service, conduct pre-trial discovery investigations upon which the United States Attorney may ground his denaturalization complaint, is no more cogent today then it was prior to the passage of the new Act.

Nor, as it has been shown, has Congress changed the statutory framework within which the denaturalization proceeding must be brought.

3. The subpoena power is a dependent power and may be legitimately exercised only in connection with such functions as the service has-independent of that power.

Minker pointed out that section 235(a) had its genesis in Section 16 of the Immigration Act of 1917, 39 Stat. 874, 855, and with respect to its subpoena provision, retained the substance of the language of its predecessor, except for the word "alien" which was changed to "person" and for the aforementioned additional clause. The Court then said that if the *additional clause* merely read "and any other matter which is material and relevant", the doctrine of *ejusdem generis* would have applied to limit the subpoena power of the Service to investigations pertaining to questions of admission and deportation. It was *only* because of the comprehensive addition of said clause that such narrow reading was precluded.

But does this follow from the overall statutory scheme of the Act and, in particular, from the provision on the power to investigate in this very section? Is it reasonable to suppose that Congress, in limiting the government's power to investigate the naturalized citizen in the post-naturalization period, intended that the Service's functions would end at the point of naturalization in all respects other than in this one special instance—where it gives to the Service the power to subpoena?

Clearly, what is "material and relevant to the enforcement of this Act and the administration of the Service, as regards the Service, must be construed and limited to mean

what is "material and relevant" to such functions as the Service has independent of this power. If the Service has no function which is "material and relevant" to denaturalization—that is, to the enforcement of the denaturalization procedure,—then no exercise of a subpoena power would be "material and relevant" to its enforcement. Giving to the Service subpoena powers to be used in connection with the denaturalization procedure would be a meaningless grant of power—for the Service could not exercise a power over a function which it does not have, nor could Congress give to them such a power.

It follows that the construction given to Section 235(a) in *Minker* rests not on "the comprehensive addition of a clause", but on a word. But as the word "Act", standing alone, refers to no particular function over which the Service may *relevantly* act, the subpoena power given to the Service can only be understood to refer to matters over which the Service's jurisdiction extends—over aliens in the pre-naturalization period. In other words, no one may be summoned by subpoena and compelled to testify before the Service, where the subject of the investigation is a naturalized citizen, because the jurisdiction of the Service ends at the point of naturalization.

Hence, the Court of Appeals' objection that "Defendant seems to be arguing on behalf of * * * (another)," misses the point completely. It is not that petitioner is arguing on behalf of another, but that the investigation relates to a naturalized citizen over whom the Service has no jurisdiction. Therefore, if the investigation is void *ab inito*, the subpoenaed witness is the proper person to assert objection to the proceeding. This is particularly true in this type of proceeding, which is a self-contained independent lawsuit between the government and the witness to compel the witness' obedience to an administrative subpoena. (See, *Cobbledick* v. *United States*, 309 U.S. 323.)

4. The enforcement order is void because the Lower Court failed to obtain jurisdiction over the person of the defendant.

Service of process is necessary to acquisition of jurisdiction over a defendant who does not voluntarily appear.

A judicial action, as here involved, for the enforcement of an administrative subpoena, is a de novo civil action requiring compliance with the Federal Rules of Civil Procedure.

The Court of Appeals overruled petitioner's contention that the District Court lacked jurisdiction over him because of lack of service of process. In so doing, the decision of the Court of Appeals was based upon two mutually inconsistent grounds:

(1) That Rule 81(a)(3) of the Federal Rules of Civil Procedure, which provides that the Federal Rules of Civil Procedure "apply to proceedings to compel the giving of testimony * * * in accordance with a subpoena issued by an officer or agency of the United States" * * * "except as otherwise provided by statute of the United States" does not render this proceeding subject to the Federal Rules of Civil Procedure, because, in the language of the opinion of the Court *United States* v. *Vivian*, 224 F. 2d 53;

> "Sec. 235(a) is a statute within Rule 81 that provides for the procedure followed here and we so hold."

Nowhere, however, in Section 235(a) do the words expressly except the Service's application for an enforcement order from the process requirements, nor do they provide for any other procedure than that prescribed in Rule 4 of the Federal Rules of Civil Procedure. Had Congress intended to give to the Service the power, in effect,

to enforce its own order (i.e. its subpoena), it would have done so without requiring the Service's application to the Court for its enforcement. Instead, Congress merely authorized the Service to seek the aid of the Court for its enforcement and remained silent on whether the Federal Rules of Civil Procedure applied. Under the rules of statutory construction, an exception to the procedure prescribed in Rule 4 of the rules, ought not to be inferred under these circumstances.

Moreover, the fact that the Service is permitted to invoke the Court's aid for judicial enforcement of its administrative subpoena, does not elevate the Service's judgment to the level of an exercise of judicial power, or conversely, render the Court's function anything less than an exercise of judicial power. On the contrary, it is precisely because of the limited power of the Service, that it must apply to the Court for the aid which it is seeking. Nor can the judiciary, abdicate or bestow this function on the Service, under Article 3 of the Federal Constitution, which vests judicial power exclusively in the Courts. And, moreover, as the judicial power is limited to adversary proceedings involving a "case or controversy" (*I.C.C.* v. *Brimson*, 154 U.S. 447. See also *Ellis* v. *I.C.C.*, 237 U.S. 434) between the parties, such application as is here made to the Court by one of the parties to this controversy, involves just such an exercise of judicial power (not the ministration of a routine act) by the Court, as requires compliance with the rules in any civil action.

The following objections, which were all raised below, are, among others, some of the valid defenses which defendant may raise at the outset to a proceeding for the enforcement of an administrative subpoena: that the hearing is not of the kind authorized by the statute (*Jones* v. *S.E.C.*, 298 U.S. 1, 26; *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186, 201, 217); improper issuance of the particu-

lar subpoena, (*Cudahy Packing Co. of Louisiana* v. *Holland*, 315 U.S. 357); that the subpoena and complaint are vague and unreasonably burdensome, (*Bowles* v. *Abrendroth*, 9 Cir., 151 F. 2d 407); that the subpoena and complaint fail to show on what ground the alleged investigation is being conducted, the witness having the right to know this, so that he can determine if the questions propounded to him are relevant (*Jones* v. *S.E.C.*, supra); and that the subpoena and complaint contain no showing of probable cause, or reasonably ground to believe there is a violation of the law (*Bowles* v. *Insel.*, 3 Cir., 148 F. 2d 91).

The fact that the lower court entered the enforcement order *ex parte* made it impossible for the Court to take these defenses into account, or even consider that they might be available to the defendant in this cause.

(2) The Court of Appeals, relying on its opinion in *Vivian*, supra, again rejected the contention that this proceeding is "a *de novo* civil action" between the government and this petitioner. In so doing, the Court, in *Vivian*, gave the following reason:

> "It would frustrate the theory and purpose of section 235(a) if every rejected subpoena would have to be subjected to a separate civil proceeding accompanied by issuance of process bottomed on a complaint. Pyramiding summonses on subpoenas serves no useful purpose * * * To construe the judicial aid mentioned in section 235(a) as requiring resort to instituting a new lawsuit requiring service of process, at its threshold, would frustrate the clear purpose of Section 235(a) * * * On her "(*Vivian's*)" theory every witness could forestall the government and force it to initiate as many lawsuits as there are witnesses in any given case."

The mistake which the Appeals Court makes here, with respect to what it terms "*Vivian's* theory", becomes apparent when we ask—In what "given case" is this person

called upon as a witness to testify? The answer is that, except for the action or proceeding brought against this very witness to compel his obedience to an administrative subpoena, there is no *other* case or proceeding which this witness could "frustrate." Indeed, the only action or proceeding is the one brought against this witness, which proceeding has been described by this Court as a "self-contained * * * independent suit" between the administrative body and the witness. And "After the court has ordered a recusant witness to testify before the commission, there remains nothing for it to do * * * So far as the court is concerned, it is complete in itself." *Cobbledick* v. *United States*, 309 U.S. 323.

Not only does the Appeal Court present us with the paradox of a case having an ending (see earlier opinion in *United States* v. *Vivian*, 217 F. 2d 882, 883) but no beginning, but this is further compounded by the fact that that court holds that the witness (against whom a judicial proceeding is brought which may ultimately result in his being cited for contempt) is not the proper person to make the jurisdictional as well as substantive objections to the proceeding.

Conclusion.

For the foregoing reasons it is urged that a Writ of Certiorari be granted.

Respectfully submitted,

PHILIP S. AIMEN AND
PEARL M. HART
Attorneys for Petitioner

Dated:

APPENDICES.

Appendix A.

Statute Involved.

"Inspection by Immigration Officers"

"Sec. 235(a). The inspection, other than the physical and mental examination, of aliens (including alien crewmen) seeking admission or readmission to or the privilege of passing through the United States shall be conducted by immigration officers, except as otherwise provided in regard to special inquiry officers. All aliens arriving at ports of the United States shall be examined by one or more immigration officers at the discretion of the Attorney General and under such regulations as he may prescribe. Immigration officers are hereby authorized and empowered to board and search any vessel, aircraft, railway car, or other conveyance, or vehicle in which they believe aliens are being brought into the United States. The Attorney General and any immigration officer, including special inquiry officers, shall have the power to administer oaths and to take and consider evidence of and from any person touching the privilege of any alien or persons he believes or suspects to be an alien to enter, reenter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service and where such action may be necessary to make a written record of such evidence. Any person coming into the United States may be required to state under oath the

purpose or purposes for which he comes, the length of time he intends to remain in the United States, whether or not he intends to remain in the United States permanently and, if an alien, whether he intends to become a citizen thereof, and such other items of information as will aid the immigration officer in determining whether he is a national of the United States or an alien and, if the latter, whether he belongs to any of the excluded classes enumerated in section 212. The Attorney General and any immigration officer, including special inquiry officers, shall have the power to require by subpoena the attendance and testimony of witnesses before immigration officers and special inquiry officers and the production of books, papers and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and to that end may invoke the aid of any court of the United States. Any United States district Court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer or special inquiry officer may, in the event of neglect or refusal to respond to a subpoena issued under this subsection or refusal to testify before an immigration officer, or special inquiry officer, issue an order requiring such persons to appear before an immigration officer, or special inquiry officer, produce books, papers and documents if demanded, and testify, and any failure to obey such order of the Court may be punished by the court as a contempt thereof."

Appendix B.

(a) Federal Rules of Civil Procedure, Rule 81(a)(3):

"These rules apply (1) to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings and (2) to appeals in such proceedings."

(b) Federal Rules of Civil Procedure, Rule 4:

"*Process,*

"(a) *Summons; Issuance.* Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to a person specially appointed to serve it. • • •

"(c) *By Whom Served.* Service of all process shall be made by a United States marshal, by his deputy, or by some person specially appointed by the Court for that purpose. • • •

"(d) *Summons; Personal Service.* The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

"(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process."

(Appendix)

Appendix C.

United States Court of Appeals
For the Seventh Circuit
Chicago 10, Illinois

Wednesday, October 24, 1956

Before

Hon. J. Earl Major, Circuit Judge
Hon. Philip J. Finnegan, Circuit Judge
Hon. Walter C. Lindley, Circuit Judge

The United States of America,
Plaintiff-Appellee,

vs.

James Budzileni,
Defendant-Appellant.

No. 11731

Appeal from the United States District Court
for the Northern District of Illinois
Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed.

(Appendix)

Appendix D.

Text of Opinion.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

SEPTEMBER TERM AND SESSION, 1956.

No. 11718.
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOHN ZUSKAR,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 11731.
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JAMES BUDZILENI,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

October 24, 1956.

Before MAJOR, FINNEGAN and LINDLEY, *Circuit Judges.*

FINNEGAN, *Circuit Judge.* Each of these appeals contains a similar basic question and for that reason we treat with them in one consolidated opinion.

(Opinion)

I. No. 11718

Zuskar, a naturalized citizen of the United States and defendant here, was subpoenaed (1) as a witness under §235(a) (2) of the Immigration and Nationality Act of

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(1) No request for the production of books, papers and documents was made.

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(2) That part of the Act, 66 Stat. 163, 198-199, appearing in § 235(a) relevant here follows:

"The inspection, other than the physical and mental examination, of aliens (including alien crewmen) seeking admission or readmission to, or the privilege of passing through the United States shall be conducted by immigration officers, except as otherwise provided in regard to special inquiry officers. All aliens arriving at ports of the United States shall be examined by one or more immigration officers at the discretion of the Attorney General and under such regulations as he may prescribe. Immigration officers are hereby authorlized and empowered to board and search any vessel, aircraft, railway car or other conveyance, or vehicle in which they believe aliens are being brought into the United States. The Attorney General and any immigration officer, including special inquiry officers, shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and, where such action may be necessary, to make a written record of such evidence. Any person coming into the United States may be required to state under oath the purpose or purposes for which he comes, the length of time he intends to remain in the United States whether or not he intends to remain in the United States permanently and, if an alien, whether he intends to become a citizen thereof, and such other items of information as will

1952, 66 Stat. 163, 198, 8 U.S.C.A. §1225(a) to give testimony before the Immigration and Naturalization Service regarding one Calvin Brook. Personal service was made, August 27, 1954, on the defendant. Acting upon the government's invocation of §235(a) by its petition, the district judge entered an ex-parte order, September 29, 1954, compelling Zuskar to appear before the Service on October 13, 1954. Two days prior to this latter date, counsel for defendant filed a written motion seeking dismissal of the complaint and vacation of the order grounded on it. A time extension was granted defendant within which to submit his written brief and the government, later, presented its memorandum in reply. These briefs, as

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aid the immigration officer in determining whether he is a national of the United States or an alien and, if the latter, whether he belongs to any of the excluded classes enumerated in section 212. The Attorney General and any immigration officer, including special inquiry officers, shall have power to require by subpoena the attendance and testimony of witnesses before immigration officers and special inquiry officers and the production of books, papers, and documents *relating to the privilege of any person to enter, reenter, reside in,* or *pass through the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and to that end may invoke the aid of any court of the United States.* Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer or special inquiry officer may, in the event of neglect or refusal to respond to a subpoena issued under this subsection or refusal to testify before an immigration officer or special inquiry officer, issue an order requiring such persons to appear before an immigration officer or special inquiry officer, produce books, papers, and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as contempt thereof."

are several others subsequently filed below by the parties, are significant because they contain the few recitations of non-evidentiary facts mentioned in the entire cause, but which are apparently undisputed. We can only decide the case before us on facts exhibited by the record and there is an utter paucity of evidence supporting the issues framed by defendant.

Relying upon the authority of our decision reported as *United States* v. *Vivian*, 224 F. 2d 53 (7th Cir. 1955) the district judge overruled defendant's motion and issued an order, dated February 2, 1956, directing Zuskar to appear and give testimony before Joseph H. Kadlec, an investigator of the Service, "relating to Calvin Brooks." Thereafter the defendant interposed a motion asking for reconsideration of the February order. Again the government responded with a written answer replying to defendant's detailed memorandum submitted in support of his latest motion. After the same district judge, who had acted throughout the earlier stages of this matter heard oral arguments of counsel for both the parties, he denied the motion for reconsideration and again issued an order compelling obedience to the administrative subpoena. This appeal followed.

We are informed in the government's brief on appeal that the facts set out in defendant's brief are substantially correct save in one or two enumerated details. If we treat such recitations as uncontroverted, it then appears from defendant's brief that " * * * He duly appeared at the time and place (referring to the Director's initial subpoena underlying the court order) through his attorney, that he was not apprised of the nature of the hearing, what was sought to be heard or discovered, the scope of the inquiry * * * "

Though defendant insists he may himself be the subject of inquiry by the Service he has failed in making any showing on that point. The superficial resemblance of this case to *United States* v. *Minker*, 350 U.S. 179 (1956) is suggested solely by defendant's argument, which evaporates for want of some evidence to give it substance. Mr. Justice Frankfurter carefully delineated the "controlling issue" disposed of in the *Minker* opinion when he said it was: " • • • whether this section [§ 235(a)] empowers an immigration officer to subpoena a naturalized citizen who is *the subject of an investigation by the Service*, where the *purpose* of the investigation is to determine if good cause exists for the institution of denaturalization proceedings under §340(a) of the Act." (Italics supplied). Actually there were two conflicting Circuit Court cases disposed of in *United States* v. *Minker*, 350 U.S. 179, 180, 182-183 (1956). A Third Circuit case, reported in 217 F. 2d 350, 351 (3rd Cir. 1955) shows that the Director's subpoena required Minker, a naturalized citizen, " to appear and testify in an administrative proceeding entitled 'In re Abraham Minker'" (id). The "doubtful question" involved there was stated by Judge Hastie as being "whether Abraham Minker, in his relation to 'In re Minker' is a witness within the meaning of Section 235(a)" (id at 351).

Falcone, et al. v. *Barnes*, 219 F. 2d 137 (2d Cir. 1955), is the other companion group of cases that were considered with *Minker* by the Supreme Court. Judge Medina, speaking for his court, said: "The sole question raised by these two appeals is whether Section 235(a) • • • authorizes an officer of the • • • Service to issue a subpoena requiring a naturalized citizen to testify in an effort to determine if 'good cause' exists for the commencement of proceedings to revoke the order admitting such person to citizenship." (id. at 139).

(Opinion)

At bar, Zuskar was subpoenaed to testify "In re Calvin Brook, file 0900-50383." While the instant administrative subpoena may be drawn to obscure what it seeks to reveal we cannot afford enough speculation to bring it within the *Minker* facts. This is not a problem of what we could envisage in this perspective, but rather an inquiry about the perspective itself. As we read the *Minker* opinion §235(a), which otherwise survived judicial scrutiny, is unavailable to the Service for instances described in the "controlling issue" already noted. The facts before us are unlike those upon which the *Minker* case holding was reached. Much of defendant's arguments erected with excerpts from the several opinions handed down by the *Minker* court, and extirpated from other sources are quickly dispelled with a trenchant passage written by Chief Justice Marshall in *Cohens* v. *Virginia*, 6 Wheat. 264 at 398 (U.S. 1821):

> "The counsel for the defendant * * * urge * * * some *dicta* of the court, in the case of *Marbury* v. *Madison*. It is a maxim, not to be disregarded, that general expressions, in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in the subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

We could only follow *United States* v. *Minker*, 350 U.S. 179 (1956) by ignoring critical factual disparities between that case and Zuskar's. All this record discloses is an attempt to compel appearance and testimony of a recalcitrant *witness*. If there is a subterfuge lurking in the Di-

rector's subpoena the defendant has done little to reveal it other than urge that his appearance and testimony might turn the tables on him. Our business is with facts. Indeed by that line of argument Zuskar virtually concedes he is only a *witness*, but one fearful of potentialities.

The constitutional attack launched against §235(a) is woefully tenuous. Administrative subpoenas ([3]) and court orders for their enforcement have been previously examined in the case-controversy and separation of governmental powers settings. *Interstate Commerce Commission* v. *Brimson*, 154 U.S. 447, 489 (1894). Since *Brimson* Congress has customarily provided for resort to the courts by agencies for orders compelling obedience to subpoenas. See e.g. Lilienthal, The Power of Governmental Agencies To Compel Testimony, 39 Harv. L. Rev. 694 (1926); Handler, The Constitutionality of Investigations By The Federal Trade Commission, 28 Col. L. Rev. 708 and 905 (1928). The present appeal does not involve a subpoena *duces tecum*.

([3]) An interesting sidelight on the old argument concerning the issuance of subpoenas by the judiciary rather that an administrative agency brings to mind this observation:

"One obvious difficulty with this view is that even if the subpena power is confined exclusively to the judiciary, the result is that subpenas are issued not by judges but by clerks of court and by the assistants who work in clerk's offices. For instance, the Federal Rules of Civil Procedure provide that clerks 'shall' issue on the request of a party both subpenas for witnesses and subpenas for records, 'signed and sealed but otherwise blank.' [Fed. R. Civ. P., 45(a)] If issuance of subpenas by anyone but a judge is dangerous to liberty, then the traditional system of the regular courts, which seemingly operates to the satisfaction of all concerned, must be radically changed." Davis, Handbook of Administrative Law 130 (1951).

(Opinion)

Much of defendant's core theories are based upon statements that Calvin Brook is a naturalized citizen or that the basic subpoena fails to state he is an alien. Neither side has troubled to establish Brooks' citizenship status as an evidentiary fact. Yet defendant asks us to read §235(a) as being inapplicable when the subject of the Service's investigation is a citizen of the United States. Defendant seems to be arguing on behalf of Calvin Brook. But §235(a) contains the word "person" in connection with the investigatory powers mentioned in that provision. If Brooks is a person his citizenship status is a matter of proof by him in his own proceeding and not a matter of defense to a subpoena by Zuskar. We decline to pass upon the constitutionality of §235(a) by guessing about Brook's citizenship, recitations in defense motions and briefs notwithstanding.

Mr. Justice Frankfurter supplied a compact over-view of the relevant legislative changes and the necessary result which followed, as part of the majority opinion in *United States* v. *Minker*, 350 U.S. 179, 184-185 (1956):

> "The 1952 Act in §235(a) retained the substance of this language in §16. But the word 'alien' was changed to 'person,' and additional language extended the subpoena power to "any matter which is material and relevant to the enforcement of this Act and the administration of the Service." If the additional clause, following the portion 'relating to the privilege of any person to enter, reenter, reside in, or pass through the United States, had merely read and any other matter which is material and relevant; the doctrine of *ejusdem generis* would appropriately be invoked to limit the subpoena power to an investigation pertaining to questions of admission and deportation. The comprehensive addition of the clause 'or concerning any matter which is material and relevant to the

enforcement of this Act and the administration of the Service,' *precludes such narrow reading.* 'Act' *encompasses the full range of subjects covered* by the statute * * * Throughout this statute the word 'Act' is given its full significance. The word embraces the entire statute. * * * " (4)

"Witness" found in §235(a) is entitled to its plain meaning. *Caminetti* v. *United States*, 242 U.S. 470 (1917); "We do not inquire what the legislature meant; we ask only what the statute means," Holmes, Collected Legal Papers 207; 2 Sutherland Statutory Construction, c. 45 (3rd ed. Horak, Jr. 1943); Mr. Justice Frankfurter, Some Reflections on the Reading of Statutes, 47 Col. L. Rev. 527 (1947). We think a §235(a) witness refers to one in the relationship that Zuskar apparently is to the Brooks matter. Nothing exhibited by the evidence before us supplies a sound legalistic basis for excluding Zuskar from the class of people legislatively designated "witnesses." It must be borne in mind that on the face of the subpoena directed to him, Minker snugly fitted into both statutory words "person" and "witness." In that setting a collision of interests, rights and values was patent.

It would be unrealistic to ignore a possibility that the Director's witness subpoenas could become a device for pre-viewing and turning up likely suspects as subjects of future investigations. Of course there is a presumption or regularity supporting official acts of public officers. *Cooper* v. *United States*, 233 F. 2d 821 (8th Cir. 1956). The sweep of power to summons witnesses is a matter for Congressional control. Any assumption that Congress overlooked this aspect of § 235(a) is unwarranted on our part. The 1952 change from the word "alien" to "person"

(4) Italics ours except for the words "*ejustim generis.*"

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demonstrates some Congressional awareness of the pr narrow scope of inquiry permitted the Service bef § 235(a).

On the other hand we refrain from constricting t potential of persons vulnerable to subpoena as witnes before the Service, by now amending or altering § 235 so that witnesses" must read as meaning only non-ci zens in order to coincide with defendant's contention. witness is protected by, and entitled to, the shield of t Fifth Amendment, and as Mr. Justice Brandeis al pointed out when speaking for the Court in *McCarthy Arndstein*, 266 U. S. 34, 40 (1924), the privilege again self-incrimination "is not ordinarily dependent upon t nature of the proceeding in which the testimony is soug or to be used. It applies alike to civil and criminal pr ceedings, wherever the answer might tend to subject criminal responsibility him who gives it." See als *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892),

When the contested issues concerning applicability certain Federal Rules of Civil Procedure, now raised this defendant's behalf, are matched with those earli disposed of by the *United States* v. *Vivian*, 224 F. 2d (7th Cir. 1955) that opinion controls this aspect Zuskar's case.

There is nothing in § 235(a) requiring the Director state a cause of action in his subpoenas. Any evaluati of the alleged refusal by the Director to inform Zusk of the reason for summoning him is thwarted by lack competent evidence on the point urged by defendant.

II. No. 11731.

Much of what we have said thus far applies with equ force in Budzileni's appeal. Indeed the questions of l

raised on his behalf so closely resemble those urged by Zuskar, it is unnecessary to repeat our views when disposing of appeal No. 11731.

Budzileni, defendant, had been subpoened by the District Director of the Immigration and Naturalization Service, Chicago, to give testimony relating to the right of privilege of *Gunnar Carl Calquist, a naturalized citizen,* to remain in the United States. Responding to this subpoena, Budzileni appeared before Stanley F. Perryman, an investigator for the Service, on June 14, 1954. Defendant refused to submit to an oath or answer many of the questions put to him by Perryman. During the latter's questioning Budzileni repeatedly stated that he was desirous of consulting an attorney. He was then advised by Perryman that no further action would be taken by the Service until June 17, 1954; that if he (Budzileni) "had not appeared by that time with his attorney the matter would be presented to the United States District Court" Defendant's absence on that continued date for hearing caused Perryman to telephone Budzileni, who stated, in substance, that he "had no intention of appearing at the Immigration office in the future or of answering any questions."

By its complaint, filed September 20, 1954, the government invoked § 235(a) of the Act. That pleading was implemented by three Exhibits: (1) the Director's subpoena directing defendant to appear on June 14, 1954, (2) a short stenographic transcript of the proceedings between the investigator and defendant, and (3) Perryman's affidavit attesting to that transcript; Budzileni's refusal to be sworn and answer under oath and the continuance granted him.

(Opinion)

Based upon the foregoing, an ex parte order compelling defendant to appear and testify before Perryman was entered, September 21, 1954, by the district judge. Subsequently a deputy U. S. Marshal served defendant with a certified copy of that order. Thereafter counsel for Budzileni filed a motion to stay the order compelling obedience to the Service's subpoena, and also asking, in the alternative, that the complaint be dismissed and the order vacated. Defendant's motion, containing the reasons and grounds relied on it support of it, was denied. This order of denial entered February 24, 1956 also embraced a further order identical in terms with the one entered on September 21, 1954. Defendant has appealed from the February order.

Since *United States* v. *Zucca*, 351 U. S. 91 (1956) a United States attorney must have an affidavit showing good cause as a prerequisite to maintenance of denaturalization proceedings under § 340(a) of the Act. Earlier, by its decision reported as *United States* v. *Minker*, 350 U. S. 179 (1956), heavily relied on by defendant, the court struck down an attempt by the Service to employ its subpoena power under § 235(a) for summoning a naturalized citizen who is himself the subject of an investigation to determine if good cause exists for the institution of § 340(a) denaturalization proceedings. It is now settled that the requisite § 340(a) affidavit cannot be prepared by the simple expedient of subpoenaing the subject person before the Service as a witness and interrogating him. The open question, whether a witness (other than a person who is named as the subject of an investigation) can be subpoenaed under § 235(a) to appear in an investigation which might culminate in a § 340(a) proceeding, either as to himself or someone else, is now before us.

Defendant stresses certain questions and answers which took place when he appeared before Perryman as show-

ing that he (Budzileni) was actually the subject of the investigation rather than Carlquist. But we think they are inconclusive.

Other than defendant's intimations and arguments we have no evidence before us establishing that he, Budzileni, is the subject of denaturalization investigations. Without more than this record reveals we refuse to choke off the application of § 234 (a) to Budzileni's subpoena.

What we said in *United States* v. *Vivian,* 224 F. 2d 53 (7th Cir. 1955) constitutes the answer to why one sentence wrested by defendant from Judge Lindley's earlier opinion in *United States* v. *Vivian,* 217 F. 2d 882 (7th Cir. 1955) would be an unwarranted point of departure in appeal No. 11731.

Though all contested issues, points and questions presented on each defendant's behalf have received full consideration, it is unnecessary to further extend this combined disposition of their respective cases.

For all the reasons stated above the judgments entered in appeals numbered 11718 and 11731, respectively, and brought here for review, are each affirmed.

JUDGMENTS AFFIRMED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

No. 11731

THE UNITED STATES,

Plaintiff-Appellee,

vs.

JAMES BUDZILENI,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

1 UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

United States of America,
Plaintiff-Appellee,

vs.

James Budzileni,
Defendant-Appellant

No. 54 C 1370

Appellant's Statement Under Rule 10(b)
of the United States Court of Appeals.

The following is Defendant-Appellant's statement of the case from the time of its commencement to the date when appeal was taken, pursuant to Rule 10(b) of the United States Court of Appeals for the Seventh Circuit:

1—This action was commenced on September 20, 1954, upon application by the United States Attorney for the United States of America, as plaintiff, for an Order directed against James Budzileni, as defendant, to compel his obedience to a certain administrative subpoena, with the filing of a Complaint in the United States District Court for the Northern District of Illinois, Eastern Division, without notice or service of summons having been first had upon said defendant.

2—The parties are and have remained without change throughout the entire course of this cause, the United States of America, plaintiff, James Budzileni, defendant.

3—On September 21, 1954, said Court entered a certain ex-parte order, directed against said defendant to appear before an Officer of the Immigra-
2 tion and Naturalization Service on September 28, 1954, in compliance with a certain subpoena issued by said administrative agency on June 7, 1954.

4—Appearance of defendant, James Budzileni, and that of his then attorney, Leonard Leon, was en-

tered and filed on September 27, 1954, along with defendant's motion to stay the order of September 21, 1954, or alternatively to dismiss the Complaint and Vacate the Order of September 21, 1954; ber 21, 1954; which motion was continued from time to time until February 17, 1956.

5—On February 17, 1956, defendant's motion for substitution of attorney was allowed, and the appearance of Philip S. Aimen, as attorney for said defendant was entered; hearing on defendant's motion was reset for February 24, 1956.

6—On February 24, 1956, upon oral argument made to Court, without jury, the Court overruled defendant's motion and entered the judgment order appealed from ordering defendant to appear before an Officer of the Immigration and Naturalization Service on March 9, 1956 and to give testimony.

7—Defendant's Notice of Appeal was filed on March 5, 1956.

Respectfully submitted,

/s/ Philip S. Aimen
Attorney for Defendant-Appellant

Philip S. Aimen
RA 6-3077
134 No. La Salle St.
Chicago 2

Received a copy of the above and foregoing Statement Under Rule 10(b) this 11th day of April A. D. 1956.

/s/ R. Tieken
Attorney for Plaintiff-Appellee

3 Pleas had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of February (it being the 6th day thereof) in the Year of Our Lord One Thousand Nine Hundred Fifty-Six and of the Independence of the United States of America, the 180th Year.

Present:

Honorable John P. Barnes, Chief District Judge
Honorable William H. Holly, District Judge
Honorable Philip L. Sullivan, District Judge
Honorable Michael L. Igoe, District Judge
Honorable William J. Campbell, District Judge
Honorable Walter J. La Buy, District Judge
Honorable J. Sam Perry, District Judge
Honorable Win G. Knoch, District Judge
Honorable Julius J. Hoffman, District Judge

Roy H. Johnson, Clerk
William W. Kipp, Sr., Marshal

Friday, February 24, 1956.

Court met pursuant to adjournment.

Present:

Honorable Michael L. Igoe, Trial Judge

4 UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 54 C 1370) * *

Be It Remembered, that on to wit, the 20th day of September, 1954, the above-entitled action was commenced by the filing of the Complaint To Compel Obedience To Subpoena, in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, in words and figures following, to wit:

5 UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 54 C 1370) * *

COMPLAINT TO COMPEL
OBEDIENCE TO SUBPOENA.

Now comes the United States of America, by R. Tieken, United States Attorney for the Northern District of Illinois, and represents to this Honorable Court as follows:

1. That James Budzileni resides in this judicial district.

2. That the Immigration and Naturalization Service is conducting an investigation relating to the right or

privilege of Gunner Carl Carlquist to remain in the United States.

3. That, pursuant to Section 235(a) of the Immigration and Nationality Act (8 U.S.C. 1225(a)), the Acting District Director, Immigration and Naturalization Service, Chicago, Illinois, by and through Stanley F. Perryman, served a subpoena upon the said James Budzileni, a true and correct copy of which subpoena, together with certificate of service thereon, is attached hereto as Exhibit "A", and made a part hereof by reference.

4. That the said James Budzileni has refused and neglected to obey the said subpoena and to give testimony as designated therein, as more fully appears from the transcript of testimony and the Affidavit of Stanley F. Perryman, attached hereto and incorporated herein by reference, and marked Exhibits "B" and "C", respectively.

6 Wherefore, the plaintiff requests this Honorable Court, pursuant to Section 235(a) of the Immigration and Nationality Act (8 U.S.C. 1225(a)), to issue an order requiring James Budzileni to appear before the Acting District Director, Immigration and Naturalization Service, Chicago, Illinois, at the address designated in the subpoena, and for such other and further relief as may be just.

/s/ R. Tieken
United States Attorney

7 EXHIBIT "A".

UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

Office of Origin:

SUBPENA

Date *June* 7, 1954

In re *Gunnar Carl Carlquist*

To: *Mr. James Budzileni*
4227 W. Addison
Chicago, Illinois

Pursuant to the provisions of Section 235(*a*) of the Immigration and Nationality Act, you are hereby com-

manded to attend and give testimony as set forth below, viz:

Place of appearance: *Room* 928, *New Post Office Building, Chicago Illinois, Canal and Van Buren Streets*

Time you are required to appear: 10:00 *A.M.*
Date you are required to appear: *June* 14, 1954
(*Monday*)

You are also commanded to produce and bring with you the following books, papers, and documents, viz:

/s/ Walter A. Sahli
District Director
Chicago District

(Seal)

Return on Service of Subpena.

I hereby certify that on the *tenth* day of *June*, 1954, I served above subpena on the witness named above by *Personal Service.*

/s/ Stanley F. Perryman
Investigator

8 EXHIBIT "B"

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
Chicago, Illinois

RECORD OF SWORN STATEMENT

In re: CARLQUIST, Gunnar Carl File No. 730-P-201202

Present

Investigator	—	Stanley F. Perryman
Deponent	—	James Budzileni
Stenographer	—	Rose S. Collar

PLACE: Room 934 New Post Office Building
Chicago 7, Illinois LANGUAGE: English

DATE: June 14, 1954 INTERPRETER: None

Investigator Perryman To Deponent:

Q. You are advised that I am an officer of the Immigration and Naturalization Service, United States Department of Justice, and as such am authorized by law to administer oaths and to take evidence in connection with the enforcement of the Immigration and Nationality laws of the United States. I wish to question you under oath at this time relative to your knowledge of one Gunnar Carl Carlquist, of whom it is indicated you have pertinent knowledge. You do not need to answer my questions unless you are willing to do so and any statements which you make under oath at this time may be used as evidence in any future proceeding. With that understanding, are you willing to give me a statement at this time under oath?

A. No, sir, not under oath.

Q. Not under oath?

A. Not under oath.

Q. On what grounds do you refuse to give me a statement under oath at this time?

A. It is my opinion, I understand that I have the right not to answer questions about my life affairs. I understand that is is an issue in the courts now and it is a controversial matter. It is up to me—I don't believe I have to make a statement under oath. In the first place, I don't think I should proceed with this without an attorney, because I am confused. I don't understand the laws, etc. I think I made a mistake not to get one.

Q. Are you willing to talk with me about this not under oath?

A. No. I don't think I should discuss the matter at all.

Q. Mr. Budzileni, you are James Budzileni, is that correct?

A. Yes.

9 Q. And you reside at 4227 West Addison in the City of Chicago?

A. Yes.

Q. And are you the person who appeared as a witness on Gunnar Carl Carlquist's naturalization?

A. I appeared as a witness, yes.

Q. And have you had a subpena served on you by officers of this Service?

A. Yes, sir.

Q. Do you have your copy of subpena with you?

A. Yes, sir.

Q. May I see it, please.

Investigator's note: Let the record show that Mr. Budzileni produced original copy of Immigration and Natural-

ization Service subpena, dated June 7, 1954, which is endorsed as having been served on Mr. Budzileni by Stanley F. Perryman, Investigator, Immigration and Naturalization Service, Chicago, Illinois, on June 10, 1954, by personal service, requiring his appearance at this office at 10:00 o'clock a.m. this date to appear with reference to Gunnar Carl Carlquist.

Q. Now, Mr. Budzileni, you refuse, then, to submit to an oath?

A. Yes. sir.

Q. Do you have any religious scruples or reservations relative to taking an oath?

A. No.

Q. What is your answer?

A. No. No.

Q. Upon what grounds specifically do you refuse to submit to an oath and give testimony under oath in this matter?

A. I told you. I understand that this thing is controversial—it is in the courts—I don't know the provisions exactly. You are asking me questions and I know they are taken down and will be held against me, and without an attorney I don't want to proceed with them.

Q. Do you have an attorney?

A. Not yet, but I will get one.

Q. Do you have any reluctance to again appear at this office at a specified time with your attorney without issuance of a new subpena?

A. That is a matter that would depend upon the attorney, see. I don't know whether I am going to appear until I see one.

Q. Well, suppose you get an attorney now to go ahead with this.

A. Well, I can't pick out an attorney out of thin air. I will have to look one up. It will take me time to get one.

Q. How much time do you suppose it would take you to get an attorney to represent you in this matter?

A. I think in two or three days.

Q. Now, Mr. Budzileni, you have appeared at this office in response to a subpena, is that correct?

A. Correct.

Q. But you refuse to submit to an oath or to give a sworn statement while under this subpena, is that correct?

A. I refuse to submit to anything without an attorney.

Q. On what ground specifically do you refuse to answer questions under oath?

A. I am telling you, I don't think I should answer questions under the circumstances. I have no witnesses here and I have nobody to advise me. I think I myself shouldn't answer any more questions until I get an attorney.

Q. Now, Mr. Budzileni, Mr. Lawson talked with you on the first visit to your apartment, do you recall that incident?

A. I recall that.

Q. And we discussed the fact that you had been employed in the Chicago Post Office and that you had been out of the Communist movement and various allied organizations since about 1947, is that correct?

A. You are proceeding with everything that—I must have an attorney here. I won't answer any questions.

Q. It was discussed before witnesses. Why should you refuse to discuss it now?

A. I told you that I won't answer because I haven't got an attorney here.

Q. But that is true, isn't it?

A. I don't want to answer any questions.

Q. Do you refuse to testify under the Fifth Amendment to the Constitution?

A. I will answer those questions after I get legal advice, not until.

Q. You are the Mr. Budzileni who once worked in the Chicago Post Office, are you not?

A. Well, look, in other words, we are going through the same questions without an attorney and I am not going to answer any questions.

Q. Mr. Budzileni, don't you realize that it would be a very simple procedure for me to produce probably one hundred witnesses without leaving this building to the effect that you did work for the Chicago Post Office? Certainly you can't incriminate yourself by answering a simple question like that?

11 A. It isn't that—I will put it just on one principal point—I am not going to answer any more questions until I get legal advice. That is simple enough. That's all. I don't have anything more to say.

Q. You don't have anything more to say then?

A. No, I don't.

Attest:

Stanley F. Perryman, Investigator

I certify that the foregoing is a true and correct transcript of the stenographic notes taken by me in this case at Chicago, Illinois, on June 14, 1954.

Rose S. Collar, Stenographer

I hereby certify that the foregoing is a true and correct copy of the transcript of the stenographic notes taken by Rose S. Collar, stenographer in this case at Chicago, Illinois, on June 14, 1954.

Gail J. Madland, Stenographer

13 EXHIBIT "C"

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
Post Office Building
Chicago 7, Illinois

State of Illinois
County of Cook—ss.

I, Stanley F. Perryman, Room 928 New Post Office Building, Van Buren and Canal Streets, Chicago, Illinois, first being duly sworn, on oath depose and say: I am an Investigator, Immigration and Naturalization Service, United States Department of Justice, Chicago, Illinois; that I, on June 10, 1954, served a subpena signed by Walter A. Sahli, District Director, United States Immigration and Naturalization Service, Chicago, Illinois, on Mr. James Budzileni of 4227 W. Addison Street, Chicago, Illinois, requiring him to appear at Room 928, New Post Office Building, Chicago, Illinois at 10 A.M. on June 14, 1954, pursuant to the provisions of Section 235(a) of the Immigration and Nationality Act; that on June 14, 1954, James Budzileni appeared in person at Room 928 as required and that on that date before the affiant and Rose S. Collar, a stenographer employed by the United States Immigration and Naturalization Service in Chicago, Illinois, refused to submit to an oath administered by affiant and refused to answer certain questions posed by the

affiant, claiming that he considered certain matters controversial and that he wished to consult an attorney before answering any questions, and that he considered that it would take him two or three days to get an attorney but would not commit himself on whether or not he would again appear at Room 928 as required with his attorney after retaining one. A certified transcript of the stenographic notes taken by Rose S. Collar was prepared immediately by Mrs. Collar. I further under oath depose and say that on June 14, 1954, in Room 928, New Post Office Building, Chicago, Illinois, I advised Mr. James Budzileni before Investigator A. G. Abrahamsen that no further action would be taken by the Immigration and Naturalization Service until June 17, 1954, at 10 A.M., and that if he had not appeared by that time with his attorney the matter would be presented to the United States District Court and tha when Mr. James Budzileni had not appeared at 10 A.M. on June 17, 1954, I telephoned Mr. James Budzileni at his residence at 12 Noon on that date, at which time he informed me that he had no intention of appearing at the Immigration office in the future or of answering any questions and refused to discuss any further matters.

Signed: Stanley F. Perryman

Subscribed and sworn to before me *Francis M. Symmes* this 27th day of August, 1954, at Chicago, Illinois.

Witness: /s/ Walter A. Sahli

Francis M. Symmes
Title Notary Public

14 And afterwards, to wit, on the 21st day of September, 1954, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe District Judge, appears the following entry, to-wit:

15 UNITED STATES DISTRICT COURT
For the Northern District of Illinois,
Eastern Division

• • (Caption—No. 54 C 1370) • •

ORDER

This cause coming on to be heard on the motion of the plaintiff, United States of America, by R. Tieken, United States Attorney for the Northern District of Illinois, made pursuant to the provisions of Section 235(a) of the Immigration and Naturalization Act (8 U.S.C. 1225(a));

And it appearing to the court that under and by virtue of the provisions of the said Section, a subpoena issued against the defendant herein on the 7th day of June, 1954, commanding him to appear at Room 928, New Post Office Building, 433 West Van Buren Street, Chicago 7, Illinois, at 10:00 A.M., on Monday, June 14, 1954; and it further appearing to the court that the defendant was personally served with a copy of the said subpoena on the 10th day of June, 1954; and it further appearing to the court that the defendant appeared on June 14, 1954, in response to the said subpoena, but refused to testify, contrary to the provisions of the said subpoena; and it appearing to the court that the defendant was granted a continuance to June 17, 1954, for the purpose of securing counsel; and it further appearing to the court that defendant refused thereafter to appear and testify;

It Is, Therefore, Ordered, that the defendant, James Budzileni, appear before Stanley F. Perryman, at Room 928, New Post Office Building, 433 West Van Buren Street, Chicago 7, Illinois, at ten o'clock in the fore-
16 noon on September 28, 1954, and then and there give testimony in compliance with the mandate of the said subpoena, under the penalty of the law by statute made and provided.

Enter:

/s/ Igoe

Dated at Chicago, Illinois, this 21st day of September, A. D. 1954.

17 And afterwards on, to wit, the 24th day of September, 1954 there was filed in the Clerk's office of said Court a certain Certified Copy of Order Entered September 21, 1954, With Marshal's Return Endorsed Thereon in words and figures following, to wit:

18 UNITED STATES DISTRICT COURT
For the Northern District of Illinois,
Eastern Division

• • (Caption—No. 54 C 1370) • •

ORDER

This cause coming on to be heard on the motion of the plaintiff, United States of America, by R. Tieken, United States Attorney for the Northern District of Illinois, made pursuant to the provisions of Section 235(a) of the Immigration and Naturalization Act (8 U.S.C. 1225(a));

And it appearing to the court that under and by virtue of the provisions of the said Section, a subpoena issued against the defendant herein on the 7th day of June, 1954, commanding him to appear at Room 928, New Post Office Building, 433 West Van Buren Street, Chicago 7, Illinois, at 10:00 A.M., on Monday, June 14, 1954; and it further appearing to the court that the defendant was personally served with a copy of the said subpoena on the 10th day of June, 1954; and it further appearing to the court that the defendant appeared on June 14, 1954, in response to the said subpoena, but refused to testify, contrary to the provisions of the said subpoena; and it appearing to the court that the defendant was granted a continuance to June 17, 1954, for the purpose of securing counsel; and it further appearing to the court that defendant refused thereafter to appear and testify;

It Is, Therefore, Ordered, that the defendant, James Budzilen, appear before Stanley F. Perryman, at Room 928, New Post Office Building, 433 West Van Buren Street, Chicago 7, Illinois, at ten o'clock in the fore-
19 noon on September 28, 1954, and then and there give testimony in compliance with the mandate of the said subpoena, under the penalty of the law by statute made and provided.

Enter:

Igoe

Dated at Chicago, Illinois, this 21st day of September, A. D. 1954.

20 CERTIFIED COPY (Rev. April 1953)
D.C. Form No. 30

United States of America
Northern District of Illinois—ss.

I, ROY H. JOHNSON, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that the annexed and foregoing is a true and full copy of the original ORDER entered September 21, 1954, in the case of U.S.A. -vs.- JAMES BUDZILENI, No. 54 C 1370, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 21st day of September, A. D. 1954.

Roy H. Johnson
Clerk,

(SEAL)

By Eleanor B. Davis
Deputy Clerk.

Served this writ on the within named James Budzileni by delivering a copy thereof to him in person this 21st day of September, A. D. 1954 and at the same time informing him of the contents thereof.

W. W. Kipp, Sr.,
U. S. Marshall

By Albert Wohlers
Deputy

20 Mileage	$2.00
Service	$2.00
Total	$4.00

20 And afterwards on, to wit, the 7th day of October, 1954 came the Defendant by his attorneys and filed in the Clerk's office of said Court his certain Motion to stay the order of September 21, 1954, Or in the Alternative to dismiss complaint and to vacate order of September 21, 1954, in words and figures following, to wit:

21 DISTRICT COURT OF THE UNITED STATES
Northern District of Illinois
Eastern Division

• • (Caption—No. 54 C 1370) • •

Motion to Stay The Order of September 21, 1954, Or in the Alternative to Dismiss Complaint and To Vacate Order of September 21, 1954.

Now comes JAMES BUDZILENI, by Leonard L. Leon, his attorney, and moves the court to stay the order of September 21, 1954, or in the alternative to dismiss the complaint herein and to vacate the order of September 21, 1954, for the following reasons:

Reasons for Staying the Order Of September 21, 1954.

1. Notice of Appeal has been filed upon the order of Court in the Case of United States of America *v.* Francis Vivian, docketed in the United States District Court for the Notrhern District of Illinois, Eastern Division as 54 C 794, a case involving a very similar factual situation, and requiring the determination of essentially identical issues of law and an interpretation of the same section of the Immigration and Naturalization Act.

Reasons for Dismissing the Complaint and Vacating the Order of September 21, 1954.

1. The court lacks jurisdiction over the person of the defendant as neither complaint nor summons were served upon the defendant as required by the Federal Rules of Civil Procedure.

2. Defendant was denied due process in that the order of September 21, 1954 was entered ex parte, without prior notice to the defendant as required by the Federal Rules of Civil Procedure.

3. The complaint does not demonstrate the need for the hearing, since it fails to allege facts to show the relationship, if any between the defendant and Gunnar Carl Carlquist, nor does the complaint show that the defendant has knowledge of any facts which would be relevant or material to the alleged investigation.

4. The complaint is defective in that it fails to show on what ground and under what section of the immigration statute the alleged investigation of Gunnar Carl
22 Carlquist is being made, nor does it allege facts showing probable cause or a reasonable suspicion of violation of the immigration laws by said Gunnar Carl Carlquist, nor does it allege that said Gunnar Carl Carlquist is an alien or that it is suspected that Gunnar Carl Carlquist is a person suspected to be an alien.

5. The subpoena of the Immigration and Naturalization Service, a copy of which is attached to the complaint, is vague and therefore defective, as it does not state the purpose of the hearing, nor does it allege that an investigation is being made relating to the right or privilege of Gunnar Carl Carlquist to remain in the United States.

WHEREFORE the defendant respectfully moves the court to stay the order of September 21, 1954, or in the alternative to dismiss the complaint and to vacate order of September 21, 1954.

James Budzileni
Defendant
By Leonard L. Levin
His Attorney
188 W. Randolph Street
Chicago 1, Illinois
FInancial 6-5575

66 And to wit, on the 24th day of February, 1956, being one of the days of regular February term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe District Judge, appears the following entries, to wit:

67 UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Devision

* * (Caption—No. 54 C 1370) * *

This cause coming on for hearing on the defendant's motion to stay the order of September 21, 1954, or in the alternative to dismiss complaint and to vacate order of September 21, 1954, come the parties by their counsel and the Court now having heard the arguments of counsel and being fully advised in the premises it is

Ordered that said motion be and the same hereby is overruled.

68 UNITED STATES DISTRICT COURT
For the Northern District of Illinois,
Eastern Division

• • (Caption—No. 54 C 1370) • •

ORDER

This cause coming on to be heard on the motion of the plaintiff, United States of America, by R. Tieken, United States Attorney for the Northern District of Illinois, made pursuant to the provisions of Section 235(a) of the Immigration and Naturalization Act (8 U.S.C. 1225(a));

And it appearing to the court that under and by virtue of the provisions of the said Section, a subpoena issued against the defendant herein on the 7th day of June, 1954, commanding him to appear at Room 928, New Post Office Building, 433 West Van Buren Street, Chicago 7, Illinois, at 10:00 A.M., on Monday, June 14, 1954; and it further appearing to the court that the defendant was personally served with a copy of the said subpoena on the 10th day of June, 1954; and it further appearing to the court that the defendant appeared on June 14, 1954, in response to the said subpoena, but refused to testify, contrary to the provisions of the said subpoena; and it appearing to the court that the defendant was granted a continuance to June 17, 1954, for the purpose of securing counsel; and it further appearing to the court that defendant refused thereafter to appear and testify;

69 It Is, Therefore, Ordered, that the defendant, James Budzileni, appear before Stanley F. Perryman, or some other duly authorized Immigration Officer, at Room 928, New Post Office Building, 433 West Van Buren Street, Chicago 7, Illinois, at nine o'clock in the forenoon on March 9, 1956, and then and there give testimony in compliance with the mandate of the said subpoena, under the penalty of the law by statute made and provided.

Enter:

Igoe
Judge

Dated at Chicago, Illinois, this 24th day of February, A. D. 1956.

70 And afterwards on, to wit, the 5th day of March, 1956 came the Defendant by his attorneys and filed in the Clerk's office of said Court his certain Notice of Appeal (Clerk's Certificate Of Mailing Attached Thereto) in words and figures following, to wit:

71 DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 54 C 1370) * *

NOTICE OF APPEAL

Notice is hereby given that James Budzileni, defendant appeals to the United States Court of Appeals for the Seventh Circuit from the judgment order entered herein by the Honorable, Michael L. Igoe, District Judge, on the 24th day of February, 1956, denying defendant's motion to dismiss the complaint and vacate the order to testify of September 21, 1954, and further ordering defendant to appear before Stanley F. Perryman, or some other duly authorized officer of the Immigration and Naturalization Service in Chicago, Illinois, at 9:00 A.M., in the forenoon on Friday, March 9, 1956, and then and there testify in an investigation relating to Gunnar Carl Carlquist, pursuant to Section 235(a) of the Immigration and Nationality Act of 1952.

/s/ Philip S. Aimen
134 N. LaSalle St.,
Attorney for Defendant
RA 6-3077

Dated: March 5th, 1956.

72 United States of America
Northern District of Illinois—ss.

* * (Caption—No. 54 C 1370) * *

Certificate of Mailing

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that on 5th day of March, 1956 in accordance with

Rule 73(b) of the Federal Rules of Civil Procedure, a copy of the foregoing Notice of Appeal was mailed to:

Honorable R. Tieken, U. S. Attorney
450 *United States Court House*
Chicago 4, *Illinois*

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 5th day of March, 1956.

Roy H. Johnson
Clerk

(Seal)

By Gizella Butcher
Deputy Clerk

75 And afterwards on, to wit, the 15th day of March, 1956 came the Appellant-Defendant by his attorneys and filed in the Clerk's office of said Court his certain Designation Of Record And Statement Of Points in words and figures following, to wit:

76 UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

APPELLANT'S DESIGNATION OF RECORD

Appellant-Defendant, James Budzileni, by his attorney, Philip S. Aimen, hereby designates the following portions of the record and proceedings to be contained in the record on its appeal to the United States Court of Appeals for the Seventh Circuit, in accordance with Rule 75 of this Court:

1. Placita.

2. Complaint filed September 20, 1954, together with Exhibits.

3. Order entered September 21, 1954, directing defendant to appear on September 28, 1954 to give testimony in compliance with administrative subpoena issued June 7th, 1954.

4. Return of United States Marshal, filed Sept. 24, 1954, of service on defendant, James Budzileni of a copy of the order entered Sept. 21, 1954.

5. Motion of defendant filed September 27, 1954 to stay Order of September 21, 1954, or alternatively to dismiss Complaint and vacate Order of September 21, 1954.

6. Defendant's motion for Substitution of Attorney and order of February 17, 1956 entered thereon.

77 7. Order of February 24, 1956 overruling defendant's motion to stay Order of September 21, 1954, or in the alternative to dismiss the Complaint and vacate order to appear dated Sept. 21, 1954, and further ordering defendant to appear before an Officer of the Immigration and Naturalization Service on March 9, 1956, and to give testimony.

8. Notice of Appeal filed March 5, 1956, showing proof of service.

9. Order entered March 12, 1956 granting defendant a supersedeas and fixing his combined supersedeas and cost bond in the sum of $250.00.

10. Order approving defendant's combined supersedeas and cost bond in the sum of $250.00.

11. Combined supersedeas and cost bond in the amount of $250.00 approved by order of Court and filed by defendant.

12. Designation of record, showing proof of service.

13. Certificate of the Clerk of this Court.

14. Transcript of Argument, dated February 24, 1956.

PHILIP S. AIMEN
Attorney for Defendant-Appellant
Philip S. Aimen—RA. 6-3077
134 No. LaSalle St. Chicago 2.

Received a copy of the above and foregoing Designation of Record this 15th day of March, A. D. 1956.

R. Tieken
Attorney for Plaintiff-Appellee per Arl

78 UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

• • (Caption—No. 54 C 1370) • •

APPELLANT'S STATEMENT OF POINTS

Appellant, James Budzileni, defendant herein, upon his appeal to the United States Court of Appeals for the Seventh Circuit, from the judgment order entered by this Court on February 24, 1956 overruling defendant's motion to stay or dismiss and vacate the order of September 21, 1954, and further ordering defendant to appear before an officer of the Immigration and Naturalization Service on March 9th, 1956, and to give testimony, intends to rely on the following points:

1. The Court erred in making and entering the judgment order appealed from.

2. The judgment order appealed from was not authorized, justified or warranted by law or by the record before the Court.

3. The Court erred in ruling it had jurisdiction over the defendant herein.

4. The judgment order appealed from is void because of lack of process required by law.

79 5. The judgment order appealed from is void because of lack of service of process required by law.

6. The judgment order appealed from is invalid because the defendant was not afforded notice of the application for the entry of said judgment order.

7. The Court erred in denying defendant's motion to dismiss on the ground that the complaint fails to state a cause of action.

8. The Court erred in entering the judgment order appealed from because the administrative subpoena sought to be enforced thereby is defective in that it fails to inform the defendant of the purpose for such hearing, or in what connection his testimony is sought, whether with respect to himself or another, nor does it state that an investigation is then being made by the administrative agency under the Immigration laws.

9. The Court erred in entering the judgment order appealed from because the administrative subpoena

sought to be enforced thereby is too broad, unreasonable, oppressive and vague.

10. The Court erred in entering the judgment order appealed from because the complaint does not make a showing of probable cause or of reasonable ground of suspicion of a violation of the Immigration laws.

11. The Court erred in entering the judgment order appealed from because the complaint fails to show that the testimony of the defendant is necessary and relevant to the alleged administrative investigation, and how it is necessary and relevant thereto.

12. The Court erred in entering the judgment order appealed from because the record shows from the questions propounded to the defendant that the testimony sought to be obtained from the defendant pertained to the defendant and was not directed to, limited by or in any wise concerned with the alleged administrative investigation of another.

80 13. The judgment order appealed from is invalid because no authority is given to the administrative agency to initiate or conduct investigations for denaturalization or loss of nationality purposes.

14. The judgment order appealed from as entered is not authorized by Section 235(a) of the Immigration and Nationality Act of 1952.

15. The judgment order appealed from is invalid and void because it was entered without due process of law guaranteed to the defendant by the Fifth Amendment to the Constitution of the United Sates, and impairs his rights thereunder.

16. The judgment order appealed from is invalid and void because if Section 235(a) of the Immigration and Nationality Act of 1952 is enforced, it violates defendant's rights under the First and Fifth Amendments to the Constitution of the United States.

PHILIP S. AIMEN
Attorney for Defendant-Appellant
Philip S. Aimen—RA 6-3077
134 N. LaSalle St., Chicago 2.

Received a copy of the foregoing Appellant's Statement of Points, this 15th day of March, A. D. 1956.

R. Tieken
Attorney For Plaintiff-Appellee Per Ald

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CITATIONS

CASES:

Bindczyck v. *Finucane*, 342 U.S. 76 7
United States v. *Minker*, 350 U.S. 179 7
United States v. *Vivian*, 224 F. 2d 53, certiorari denied, 350 U.S. 953 ..... 6, 8
United States v. *Zucca*, 351 U.S. 91 ..... 7, 8

STATUTE AND RULES:

Immigration and Nationality Act of 1952, Section 235(a), 66 Stat. 163, 198, 8 U.S.C. 1225(a) 2, 5, 6-8

Federal Rules of Civil Procedure:
Rule 4 4
Rule 81(a)(3) 4

MISCELLANEOUS:

8 C.F.R. § 340.11 8

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 689

JAMES BUDZILENI, Petitioner

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 23-35) is reported at 237 F. 2d 528.

JURISDICTION

The judgment of the Court of Appeals was entered on October 24, 1956 (Pet. App. 22). The petition for a writ of certiorari was filed on January 11, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under Section 235(a) of the Immigration and Nationality Act of 1952, an immigration officer has power to subpoena a witness in an investigation concerning the right of a naturalized citizen to remain in the United States.

2. Whether an action for enforcement of such a subpoena is a *de novo* civil action requiring compliance with the Federal Rules of Civil Procedure.

STATUTE AND RULES INVOLVED

1. Section 235(a) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 198, 8 U.S.C. 1225(a), provides as follows:

> The inspection, other than the physical and mental examination, of aliens (including alien crewmen) seeking admission or readmission to or the privilege of passing through the United States shall be conducted by immigration officers, except as otherwise provided in regard to special inquiry officers. All aliens arriving at ports of the United States shall be examined by one or more immigration officers at the discretion of the Attorney General and under such regulations as he may prescribe. Immigration officers are hereby authorized and empowered to board and search any vessel, aircraft, railway car, or other conveyance, or vehicle in which they believe aliens are being brought into the United States. The Attorney General and any immigration officer, including special inquiry officers, shall have power to administer oaths and to take and consider evidence of and from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, pass through, or reside in the United States or concerning any matter which is material and relevant to the en-

forcement of this Act and the administration of the Service, and, where such action may be necessary, to make a written record of such evidence. Any person coming into the United States may be required to state under oath the purpose or purposes for which he comes, the length of time he intends to remain in the United States, whether or not he intends to remain in the United States permanently and, if an alien, whether he intends to become a citizen thereof, and such other items of information as will aid the immigration officer in determining whether he is a national of the United States or an alien and, if the latter, whether he belongs to any of the excluded classes enumerated in section 212. The Attorney General and any immigration officer, including special inquiry officers, shall have the power to require by subpena the attendance and testimony of witnesses before immigration officers and special inquiry officers and the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and to that end may invoke the aid of any court of the United States. Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer or special inquiry officer may, in the event of neglect or refusal to respond to a subpena issued under this subsection or refusal to testify before an immigration officer or special inquiry officer, issue an order requiring such persons to appear before an immigration officer or special inquiry officer, produce books, papers, and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof.

2. The Federal Rules of Civil Procedure provide in pertinent part as follows:

Rule 81(a):

(3) * * * These rules apply (1) to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings, and (2) to appeals in such proceedings.

Rule 4. *Process*

(a) *Summons; Issuance.* Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to a person specially appointed to serve it. * * *

(c) *By Whom Served.* Service of all process shall be made by a United States marshal, by his deputy, or by some person specially appointed by the court for that purpose * * *.

(d) *Summons; Personal Service.* The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

STATEMENT

Petitioner was personally served on June 10, 1954, with a subpoena issued by the Immigration and Naturalization Service pursuant to Section 235(a) of the Immigration and Nationality Act of 1952 (*supra*, pp. 2-3). The subpoena directed petitioner to appear on June 14, 1954, to give testimony in an investigation relating to the right of a naturalized citizen, Gunnar Carlquist, to remain in the United States (R. 5, 6, 7).

On June 14, in response to the subpoena, petitioner admitted that he had appeared as a witness at Carlquist's naturalization, but refused to answer under oath questions by the immigration inspector on the grounds that they were controversial and that he did not have a lawyer (R. 7-11). The investigator informed petitioner that the Service would take no further action until June 17, 1954, but that "if he had not appeared by that time with his attorney the matter would be presented to the United States District Court." When petitioner did not appear on June 17, the investigator telephoned, and petitioner announced that he had "no intention of appearing at the Immigration office in the future or of answering any questions" (R. 12).

On September 20, 1954, the Government filed in the United States District Court for the Northern District of Illinois a complaint to compel obedience to the subpoena (R. 5-6). This complaint was supported by three exhibits—the subpoena, a transcript of the June 14 proceedings, and the investigator's affidavit as to petitioner's refusal to testify (R. 6-12). On September 21, 1954, the District Court entered an ex parte order requiring petitioner to appear before the investi-

gator on September 28 to give testimony in compliance with the subpoena. A certified copy of this order was personally served upon petitioner (R. 13-15). The hearing scheduled for September 28 was apparently continued (R. 4).

On October 7, 1954, petitioner's attorneys filed a motion to stay the order of September 21, 1954, or in the alternative to dismiss the complaint and to vacate the September 21 order. The reason assigned for staying the order was the pendency on appeal of a similar case entitled *United States* v. *Francis Vivian* (see 224 F. 2d 53 (C.A. 7), certiorari denied, 350 U.S. 953). As reasons for dismissing the complaint and vacating the order, petitioner alleged, *inter alia,* that the court lacked jurisdiction since neither a complaint nor summons was served upon him as required by the Federal Rules of Civil Procedure, and that the complaint was defective in not alleging that Carlquist was an alien or a suspected alien (R. 16-17).

On February 24, 1956, after the *Vivian* case had been decided on appeal, the District Court overruled petitioner's motion, and ordered that he appear before the immigration investigator on March 9, 1956, to give testimony in compliance with the subpoena or suffer the statutory penalty (R. 17-18). Petitioner appealed from these orders (R. 19). The Court of Appeals unanimously affirmed (Pet. App. 22).

ARGUMENT

1. Petitioner's principal contention is that the Immigration and Naturalization Service had no power to subpoena him to testify as a witness under Section 235(a) of the Immigration and Nationality Act of 1952 (*supra,* pp. 2-3), since the subject of the investi-

gation, Gunnar Carlquist, was a naturalized citizen. This contention, however, is foreclosed by this Court's decision in *United States* v. *Minker,* 350 U.S. 179, 185. It was there expressly held that Congress, by the use in Section 235 (a) of the phrase "concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service," meant to encompass "the full range of subjects covered by the statute," including the denaturalization investigation which was before the Court in that case.[1] The critical phrase "relevant to the enforcement of this Act" appears both in the sentence conferring power to administer oaths and in the sentence conferring subpoena power. Petitioner's attempt to limit the subpoena power by what he deems a restriction on the oath-administering power to matters concerning aliens (Pet. 9-13) is therefore unsound under *Minker.*

Petitioner also requests this Court to reconsider the holding of *Minker* as to the applicability of Section 235(a) to denaturalization investigations in the light of its prior decision in *Bindczyck* v. *Finucane,* 342 U.S. 76, and its subsequent decision in *United States* v. *Zucca,* 351 U.S. 91, 99 (Pet. 7-9). The *Minker* ruling is, however, completely consistent with both those opinions. It is true that they hold that denaturalization proceedings may be instituted only by a United States Attorney under Section 340(a) of the 1952 Act. From this it does not follow, however, that immigration officers do not have power to conduct investigations pursuant to Section 235(a) in order to determine

[1] The *Minker* decision went on to hold that the person thought to be subject to denaturalization was not a "witness" under Section 235(a), but that aspect of the case is not pertinent here, where petitioner has been called merely as a witness with regard to possible action against another.

preliminarily whether denaturalization proceedings should be instituted. Under Section 340(a), such proceedings may be instituted "upon affidavit showing good cause therefor"; and it is usually only after studying an administrative investigation and report under 8 C.F.R. § 340.11[2] that a United States Attorney is in a position to decide whether such "good cause" does exist, and to obtain the affidavit which *Zucca* requires.

2. There is no merit to petitioner's contention that the judicial action for enforcement of an administrative subpoena issued under Section 235(a) is a *de novo* civil action requiring compliance with the Federal Rules of Civil Procedure (Pet. 15-18). This question was also presented in *United States* v. *Vivian*, 224 F. 2d 53 (C.A. 7), certiorari denied, 350 U.S. 953, and we respectfully refer the Court to the Government's brief in opposition in that case (No. 322, O.T. 1955, pp. 8-12).

Petitioner also is in error in asserting that he was deprived of the opportunity to present for the District Court's consideration his objections to the propriety of the subpoena (Pet. 16-17). Such defenses as peti-

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[2] "*Investigation and report.* Whenever it appears that any grant of naturalization may have been procured by concealment of a material fact or by wilful misrepresentation, the facts shall be reported to the district director having jurisdiction over the naturalized person's last known place of residence. If the district director is satisfied that a prima facie showing has been made that grounds for revocation exist, he shall cause an investigation to be made and report the facts in writing to the Commissioner with a recommendation as to whether revocation proceedings should be instituted. If it appears that naturalization was procured in violation of section 1425 of Title 18 of the United States Code, the facts in regard thereto may be presented by the district director to the appropriate United States Attorney for possible criminal prosecution."

tioner had, including the contention that neither a complaint nor summons had been served upon him as required by the Federal Rules of Civil Procedure, were raised in his motion to stay the court's order of September 21 (requiring compliance with the subpoena) or in the alternative to dismiss the complaint and vacate the September 21 order. This motion was overruled, but only after the court had "heard the arguments of counsel and [had been] fully advised in the premises" (R. 17-18).

CONCLUSION

The decision below is correct, and there is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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